No. 84-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF *AMICUS CURIAE* AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether federal jurisdiction to regulate discharges into "navigable waters," under the Federal Water Pollution Control Act, as amended, extends to lands that merely have saturated soils and exhibit a prevalence of vegetation typically adapted for life in such soils.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Constitution, Statutes and Regulations:

Statutes & Regulations:

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INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 36.2, the American Petroleum Institute files this brief as *amicus curiae* in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the clerk.

The American Petroleum Institute is a national trade association with a membership of approximately 230 corporations and 6,000 individuals. Because our members frequently must apply for permits issued by the U.S. Army Corps of Engineers ("Corps") for the disposal of dredge or fill material into "navigable waters," we and our members have a substantial interest in the issue now under review.

SUMMARY OF ARGUMENT

The court of appeals properly found the Corps' overly expansive definition of "navigable waters" to be beyond the intent of Congress. At no time did Congress express an intent that "navigable waters" include lands whose soils become saturated by either rainwater or groundwater. To the contrary, Congress knew well what "navigable waters" were when it amended the Federal Water Pollution Control Act ("FWPCA" or the "Act") in 1961 to extend its coverage to "navigable waters" and when it amended the Act again in 1972 to define that term.

The intent of the 92nd Congress in defining "navigable waters" was to make clear that this Court's interpretations of that term, reflected in a long line of opinions defining the spatial limits of Congress' Commerce Clause power over "navigable waters," would be controlling – not administrative determinations which had been made for ease or efficiency. That this was so is made clear by the several statutory provisions concerning the interrelation between the FWPCA and the Refuse Act. Moreover, it was the Refuse Act and its permitting scheme, based upon controlling discharges to "navigable waters" at their source, which served as the model for the creation of the Act's new permitting regimes.

The Corps' 1974 regulatory definition of "navigable waters" under the FWPCA was overly constrained and summarily overturned by the courts. In response, the Corps developed revised definitions in 1975 which, while going incrementally beyond the intent of Congress, extended the Corps' regulatory jurisdiction to wetlands adjacent to "navigable waters" if they were periodically inundated by such waters and if the vegetation there found required periodic inundation to grow and reproduce.

Subsequent amendments have not altered the definition of "navigable waters." Thus, the deliberations of the 92nd Congress remain the best expression of what was intended by the words it used. The 1977 legislative history and the extensive congressional hearings over the Corps' 1975 regulations, however, may indicate that these regulations were legislatively ratified.

The regulatory definition at issue here, promulgated late in the 1977 legislative process, defines "navigable waters" in terms so broad as to be almost unrecognizable when compared with the thoroughly reviewed and considered 1975 rulemakings. Consequently, no credible argument can be made that it, too, was legislatively ratified.

Although the "navigable waters" concept may be broad, it is not so broad as to include all lands that merely have saturated soils and vegetation that tolerates, but does not require, saturated soils. Accordingly, the judgment below should be affirmed.

ARGUMENT

The question presented is whether federal jurisdiction over "navigable waters" extends beyond true "waters" to include lands that merely have saturated soils and a prevalence of vegetation adapted for life in such soils. Ultimately, the question is whether these lands are "waters of the United States."

The court below took a common sense approach to the problem and held that the term "navigable waters," as defined by the Act, includes all water bodies (e.g., lakes and rivers) and all adjacent wetlands that depend for their existence upon frequent flooding by such water bodies, but no more. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 397-398, 401 (6th Cir. 1984). In so holding, the court rejected the Corps' 1977 definition of "navigable waters," which had placed certain lands under its regulatory control.

The issue here is not whether Congress *could* regulate activities on these lands,[1] but whether Congress *did* intend to do so when it defined the term "navigable waters" in 1972. The 1972 Amendments did not emerge out of thin air. Considerable case law and legislative activity had preceded them. Conse-

[1]For example, we recognize that Congress can regulate a broad array of activities under the Commerce Clause if it first determines that they may have effects in more than one state. *See Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

quently, the intent of Congress in defining this term can best be discerned by placing its actions in their historical context.[2] Viewed in this light, its intent becomes clear and that intent supports fully the view expressed by the court below.

I. Congress Was Fully Aware Of What Were "Navigable Waters" When It Amended The Federal Water Pollution Control Act In 1972.

The 1972 Amendments define "navigable waters" as "the waters of the United States, including the territorial seas."[3] Since that definition has not been altered by subsequent amendments, the legislative history surrounding its adoption constitutes the best expression of congressional intent as to its meaning. The 1972 legislative history reflects well-developed prior law concerning federal jurisdiction over "navigable waters," particularly under the Refuse Act[4] and the Federal Water Pollution Control Act of 1961.[5] It is to these earlier developments that we first turn.

1. In the second half of the 19th Century, Congress repeatedly confronted the problem posed by the discharge of refuse and other materials into the waters of the United States.[6] Its efforts culminated in the passage of the Rivers and Harbors Act of

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[2]Such a historically-based approach to discerning the extent to which Congress intended to exercise its constitutional powers is not novel and has often been used by this Court in other settings. *See, e.g., Chemehuevi Tribe of Indians v. Federal Power Commission,* 420 U.S. 395, 400-08 (1975).

[3]P.L. 92-500, §502(7), 91 Stat. 1566 (1972) (codified at 33 U.S.C. §1362(7) (1982)).

[4]The Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1982), commonly known as the "Refuse Act."

[5]P.L. 87-88, 75 Stat. 204 (1961).

[6]*See, e.g.,* River and Harbor Act of 1886, P.L. 49-929, §3, 24 Stat. 329 (1886); New York Harbor Act of 1888, P.L. 50-469, §1, 25 Stat. 209 (1888); River and Harbor Act of 1890, P.L. 51-907, §6, 26 Stat. 453 (1890); River and Harbor Act of 1894, P.L. 53-299, §6, 28 Stat. 363 (1894).

1899. Section 10 of that Act created separate prohibitions against: (1) obstructing "the navigable capacity of any of the waters of the United States"; (2) building any structure in "any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States"; and (3) excavating, filling, or modifying the condition or capacity of "any navigable water of the United States."[7] Section 13 went considerably further and declared it to be unlawful to discharge refuse of any kind or description into any "navigable water of the United States" or into "any tributary of any navigable water."[8]

Between 1899 and 1966, considerable uncertainty existed over whether discharges under the Refuse Act were limited to discharges that have a tendency to affect navigation. This quandary was laid to rest by *United States v. Standard Oil Co.,* 384 U.S. 224, 228-29 (1966), wherein this Court held that "the 'serious injury' to our watercourses . . . sought to be remedied [by the Refuse Act] was caused in part by obstacles to navigation and in part by pollution." *See also United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670-72 (1973). Nonetheless, when the Corps revised its regulations in 1968, it continued to define Refuse Act discharges as only those which impede navigation.[9]

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[7]33 U.S.C. §403 (1982).

[8]33 U.S.C. §407 (1982). Although the Refuse Act also prohibits the depositing of any refuse on the banks of a navigable water or a tributary thereof, such is prohibited by the terms of that Act only when deposited materials might later impede or obstruct navigation. No such navigation-based limitation appears or applies to discharges directly into navigable waters or their tributaries. *See United States v. Pennsylvania Industrial Chem. Corp.,* 411 U.S. 655, 670 n.23 (1973).

[9]The geographic scope of the Rivers and Harbors Act of 1899, including section 13 (the Refuse Act), was then envisioned by the Corps as being limited to "navigable waters," thereby improperly excluding the tributaries of navigable waters from its regulatory control, 33 C.F.R. § 209.200(e)(2) (1969). To make matters worse, the Corps adopted a crabbed definition of "navigable waters," which excluded nonnavigable waters that could be made navigable through reasonable improvements, *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-10, 416 (1940), and intrastate waters that serve as a link

The Corps' overly constrained approach under the Refuse Act was swept away by Executive Order No. 11574.[10] The executive order not only included tributaries within Refuse Act jurisdiction, but also omitted any reference to required effects upon navigation, glaring deficiencies under the Corps' earlier regulations. Significantly, this new permit program was based, at least in part, upon the report of the House Committee on Government Operations entitled *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution.*[11] Although the President envisioned this new program as providing "a major strengthening of our efforts to clean up our Nation's waters,"[12] its separate existence was cut short just eighteen months later by the passage of the Federal Water Pollution Control Act Amendments of 1972.

2. In 1948, Congress passed the first Federal Water Pollution Control Act.[13] Although largely advisory and consultative in nature, the Act did include a limited, but cumbersome, quasi-enforcement scheme for the abatement of pollution of "interstate waters."[14] Congress simplified the federal enforcement process in 1956[15] and again in 1961.[16] In addition, the 1961

in the chain of commerce among the States, *cf. Utah v. United States,* 403 U.S. 9, 11 (1971) and cases cited therein. 33 C.F.R. § 209.260 (1969).

[10]35 Fed. Reg. 19627 (1970).

[11]H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970). *See* 117 Cong. Rec. 1754 (1971) (remarks of Rep. Dingell).

[12]Weekly Compilation of Presidential Documents 1724 (Dec. 23, 1970).

[13]P.L. 80-845, 62 Stat. 1155 (1948).

[14]§2, 62 Stat. 1156. The polluting act that would give rise to an abatement action included discharges directly into interstate waters and discharges to the tributaries of such waters, provided that the pollution crossed state lines and endangered the health or welfare of persons in a neighboring state. *Id.*

[15]The Water Pollution Control Act of 1956, P.L. 84-660, §8, 70 Stat. 498, 504-05 (1956).

[16]The Federal Water Pollution Control Act of 1961, P.L. 87-88, §7, 75 Stat. 204, 207-10 (1961).

Amendments expanded the geographic scope of the Act's abatement/enforcement scheme to include all "navigable waters."[17]

Congress then considered water to be "the No. 1 resource problem confronting the United States" and concluded that a water pollution enforcement scheme limited to interstate waters was wholly inadequate to address this problem.[18] Particularly significant here is the clear recognition of the type of constitutional power Congress was then exercising. For example, the House Report contains an in-depth discussion of the constitutional power of Congress over "navigable waters":

> It is well settled that the jurisdiction of Congress over waters capable of use as highways of interstate or foreign commerce, which is derived from the commerce clause of the Constitution, extends as well to intrastate [citations omitted] as to interstate waters [citations omitted]. The power to regulate commerce necessarily embraces all matters pertaining to navigation on such waters but is not limited to navigation . . . Congress and the courts have long assumed that as "public property" of the Nation the quality of navigable waters of the United States is within the protection of Congress. For over 61 years the pollution of navigable waters by refuse has been prohibited by Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. 407) without regard to its effects on navigation.[19]

It is also noteworthy that Congress then recognized that its expansion of the Act to encompass "navigable waters" would

[17]*Id. See also* H.R. Rep. No. 306, 87th Cong., 1st Sess. 1-3, 8-12, 16-18 (1961); S. Rep. No. 353, 87th Cong., 1st Sess. 2, 91 (1961); 107 Cong. Rec. 7144-47 (1961) (House debate).

[18]H.R. Rep. No. 306, 87th Cong., 1st Sess. 2, 8 (1961). Of an estimated 26,000 water bodies in the United States, only 4,000 were of an interstate nature. *Id.*

[19]H.R. Rep. No. 306, 87th Cong., 1st Sess. 10 (1961).

result in exactly the same waters being covered under the FWPCA as under the Refuse Act.[20]

The issue is brought into even sharper focus when one considers the minority views on the House bill. In opposing an expansion of federal jurisdiction beyond "interstate waters," it was observed that this would "*extend federal enforcement jurisdiction to all waters*" and that "*for all practical purposes the new Federal enforcement provision would apply to all waters in every State.*" (emphasis in original).[21] The dispute continued to the floor, but the committee bill passed and later became the Federal Water Pollution Control Act of 1961.[22] Although the Act was amended several times thereafter, none of these changes affected its scope or shed any additional light on congressional intent until the onset of deliberations in the 92nd Congress.

3. By late 1971, the role of the Refuse Act in preventing industrial pollution had been well defined through the implementation of a Refuse Act permit program under Executive Order No. 11574. Moreover, the FWPCA, as amended, was recognized as having the same geographic coverage as the Refuse Act; each complemented the other. Although both laws were based upon federal jurisdiction over "navigable waters," neither contained a definition of this term. This was not perceived by Congress to be a deficiency because numerous decisions of this Court had defined clearly the geographic limits of "navigable waters."

Early in its history, this Court recognized that the power to regulate commerce under the Commerce Clause, U.S. Constitution, art. 1, §8, cl. 3, necessarily included power over navigation. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824). After recognizing the constitutional basis for the exercise of such power, this Court then proceeded to define its spatial limits. In what is sometimes referred to as the classic definition of

[20]*See* 107 Cong. Rec. 7145 (1961) (statement of Rep. Burdick, one of the bill's floor managers).

[21]H.R. Rep. No. 306, 87th Cong., 1st Sess. 24, 25 (1961).

[22]107 Cong. Rec. 7144-62, 7165-72, 7195 (1961).

"navigable waters," this Court stated that the term included those waters that

> form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). In subsequent cases this definition was broadened to include all waters capable of use for waterborne commerce,[23] all waters with a past history of use by waterborne commerce,[24] all waterways that could be made navigable "with reasonable improvements,"[25] and all waters that serve as a link in the chain of commerce among the states, a chain that can include other modes of commerce as well (e.g., highways or railroads).[26]

These spatial concepts, grounded upon recognized Commerce Clause power over navigation, served to define clearly the scope of the FWPCA and the Refuse Act. Although the geographic scope of these laws was defined by reference to waterborne commerce (i.e., navigability), the incidence of federal power over such waters is not so limited. As expressed in *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 426 (1940):

> It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation . . . That authority is as broad as the needs of commerce . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.[27]

[23]*The Montello,* 87 U.S. (20 Wall.) 430, 441-42 (1874).

[24]*Economy Light & Power Co. v. United States,* 256 U.S. 113, 121-122 (1921).

[25] *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-10 (1940).

[26]*Utah v. United States,* 403 U.S. 9, 11 (1971).

[27]To this list should be added the power to protect such waters from pollution. *United States v. Standard Oil Co.,* 384 U.S. 224, 229-30 (1966). *See also* H.R. Rep. No. 306, 87th Cong., 1st Sess. 10 (1961).

Thus, by late 1971 this Court had developed a doctrine of "navigable waters" which defined an expanded, but clearly limited, area in which Congress can exercise its Commerce Clause regulatory powers.

II. The Extensive Legislative History Surrounding Enactment Of The 1972 Amendments Demonstrates Conclusively That The 92nd Congress Recognized The Differences Among Land, Water And The "Waters Of The United States," Considered The Geographic Reach Of Its Amendments As Being Identical To Then Existing Federal Jurisdiction Under The Refuse Act, And Intended The Term "Navigable Waters" To Apply To The Furthest Extent Of Its Commerce Clause Power As That Power Had Been Applied To Waterborne Commerce By This Court.

1. The Senate took the lead in advancing amendments to the FWPCA during the 92nd Congress. The bill which emerged from the Committee on Public Works (S. 2770) defined "navigable waters" as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."[28] As explained by the accompanying report:

> The control strategy of the act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

[28]S. 2770, 92d Cong., 1st Sess. §502(h) (1971), *reprinted in* S. Rep. No. 414, 92d Cong., 1st Sess. (1971).

S. Rep. No. 414, 92d Cong. 1st Sess. 77 (1971). Standing alone, this explanation may be less than a model of clarity, but when read in conjunction with section 402(a)(4) of the FWPCA[29] and its accompanying legislative history, the intent of the language becomes clear.

The precursor to section 402(a)(4) contained in S. 2770 was section 402(a)(3) of the committee bill. In explaining this provision, the committee stated:

> Section 402 provides statutory basis for the continuation of a Federal program to control, on a source by source basis the discharge of pollutants into the navigable waters.
>
> In addition to redirecting the control program from ambient standards to direct effluent controls, the second most difficult policy and program issue which the Committee considered was the integration of the program under section 13 of the Refuse Act of 1899 initiated by the Administration pursuant to Executive Order in December of 1970.
>
> When implemented and applied to pollution, the Refuse Act permit program established a direct relationship between the Federal Government and each industrial source of discharge into the navigable waters of the United States.
>
> This relationship existed completely independent of the Federal-State program established under the 1965 Act and created a duality of control requirements that placed all parties under a cloud of uncertainty. In addition to the problem of intergovernmental relations, the Refuse Act authority has significant gaps (particularly its exemption of municipal waste treatment

[29]Section 402(a)(4) provides, in pertinent part, that:

> All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [the Refuse Act], shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 . . . .

33 U.S.C. §1342(a)(4) (1982).

> works) that render it seriously inadequate as a means of implementation of a water pollution control program.

S. Rep. No. 414, 92d Cong., 1st Sess. 70 (1971). The report later stated that:

> The period of implementation of the Refuse Act permit program coincides with the evolution of the bill reported by the Committee. Consequently, continuous consultation was undertaken with representatives of State governments, and the Administration in an effort to weave the permit program into this legislation. The Refuse Act as now restated in the Committee bill establishes that the discharge of pollutants into the navigable waters of the United States is prohibited. The Federal Government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters and, under the Committee bill, seek to achieve elimination of the discharge of pollutants.

Id. at 71.

Although the committee found that "the national effort to abate and control water pollution has been inadequate in every vital respect," *Id.* at 7, nowhere did it suggest that the scope of the term "navigable waters," as used in the Refuse Act and the 1961 Amendments or as interpreted by the courts, was in any way deficient. To the contrary, the committee unquestionably considered the new permit regime to be created by S. 2770 as being nothing more than a simple codification and continuation, with certain procedural changes, of the Refuse Act permit program.[30] Thus, at the time the bill passed, there can be no question as to the Senate's conception of what "navigable waters" were and what its definition was expected to include.

[30]To be sure, neither the Refuse Act nor the adoption of a permit program thereunder were perfect in every respect. For example, authority was split between two federal agencies, the permit scheme appeared cumbersome and, most importantly, sewage was specifically exempted from the Act's statutory prohibition. *See United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966); S. Rep. No. 414, 92d Cong., 1st Sess. 5, 8, 70 and 71 (1971). *See also* 117 Cong. Rec. 38845-46 (1971) (colloquy between Senators Curtis and Muskie, with additional statements by Senators Buckley and Cooper).

2. On its face, the House bill's definition of "navigable waters" was somewhat narrower in scope than its Senate counterpart: it made no reference to tributaries and would have simply defined "navigable waters" as being "the navigable waters of the United States."[31] The report language accompanying H.R. 11896 is quite cryptic:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972).

Although the committee apparently felt compelled to define this term because the Senate had done so in its bill, the definition selected accomplished precisely the same result as if no definition had been provided (i.e., by defining navigable waters in a circular fashion, no effective definition was given to the term). Had the bill not defined the term and had no definition been included in the Act, the term "navigable waters" would have been subject to administrative interpretation. Prior administrative definitions of "navigable waters," however, had been far less inclusive than permitted under the case law, apparently because of administrative considerations. To prevent this from recurring in the future, the committee stated that the broad judicial interpretations of the "navigable waters" concept

[31]H.R. 11896, 92d Cong., 2d Sess. §502(8) (1972). Since the committee also saw the geographic scope of the bill as being identical to then existing coverage under the Refuse Act (*see* discussion *infra* pp. 14-15 and since the Refuse Act prohibition upon the discharge of pollutants applies to navigable waters and tributaries thereof, this omission was of little practical significance.

should control, not administrative concerns over ease of application or efficiency.[32]

That the House recognized the committee bill definition to be less inclusive than all waters, wherever located and however found, is made clear by the floor debate over amendments which would have expanded the bill's enforcement provisions to encompass all ground waters.[33] Significantly, no party to that debate argued that the amendments were unnecessary because ground waters were already included under the definition of "navigable waters." Every participant recognized that ground waters were *not* within the definition and, therefore, argued the substantive merits of whether the bill's controls should extend to groundwater.

The House bill also addressed the relationship between the Refuse Act and the FWPCA, but it went even further than the Senate bill and equated the two Acts permitting programs.[34] The House clearly contemplated that the geographic scope of the new permit program would be the same as the then existing scope of the Refuse Act.[35] Had the committee perceived that "navigable waters" would be any more expansive, surely some comment to that effect would have appeared in the legislative history. This is especially true when one recalls the contentiousness with which the 1961 Amendments were greeted in the same committee under the same chairman (Representative Blatnick), as well as on the floor.[36]

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[32]As discussed above, the Corps' original definition of "navigable waters" under the Refuse Act was overly constrained. This shortcoming was largely remedied by its later adoption of regulations more in tune with the judicial precedents. 37 Fed. Reg. 18289 (1972).

[33]118 Cong. Rec. 10666-69 (1972).

[34]H.R. 11896, 92d Cong., 2d Sess. §402(a)(4) (1972).

[35]H.R. Rep. No. 911, 92d Cong. 2d Sess. 125-26, 166-67, 398-405 (1972) (Additional views of Reps. Abzug and Rangel), and 414 (letter of Rep. Dingell, *et al.)*. Since sections 402(a)(4) and (5) of the bill later became law, their history is especially pertinent here.

[36]*See* discussion *supra* p. 8.

In short, no one[37] considered the bill as resulting in any expansion of federal jurisdiction beyond preexisting law, particularly the Refuse Act, and the judicial interpretations of the term "navigable waters."

3. Due to the many differences between S. 2770 and H.R. 11896, they were submitted to conference. The conferees considered the House definition of "navigable waters" to be "basically the same as provided in the Senate bill" and adopted the same cryptic language contained in the report accompanying H.R. 11896.[38] The most instructive background on the conference substitute is to be found in the views expressed by the floor managers: Senator Muskie and Representative Dingell.

Senator Muskie presented a carefully prepared, detailed discussion of the Senate conferees' views on the floor. As to the definition of "navigable waters," he offered the following:

> One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."
>
> The Conference agreement does not define the term. The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.
>
> Based on the history of consideration of this legislation, it is obvious that its provision and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in

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[37]*See also Hearings on H.R. 11896 before the House Committee on Public Works,* 92d Cong., 2d Sess. 306-07 (1972) (statement of the EPA Administrator); 118 Cong. Rec. 36775-81 (1972) (letter from the EPA Administrator urging support for the conference bill).

[38]S. Rep. No. 1236, 92d Cong., 2d Sess. 143-44 (1972). As to the relationship between the Refuse Act and FWPCA, the conferees agreed to the Senate bill, as revised by the House amendments. *Id.* at 139.

> fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

118 Cong. Rec. 33699 (1972). The statement of Representative Dingell is to the same effect.[19]

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[19]In referring to the definition of "navigable waters" he stated:

> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case (77 U.S. 557, 563) – to include waterways which would be "susceptible of being used *** with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, *et cetera United States v. Utah*, 283 U.S. 64 (1921); *United States v. Appalachian Electric Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945); *cert. den.*, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) *cert. den.*, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA 2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).
>
> The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power *** To regulate commerce with Foreign Nations and among the several states ***" (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972) [sic].
>
> Thus, this new definition clearly encompasses all water bodies, including mainstreams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.
>
> 118 Cong. Rec. 33756-57 (1972).

Clearer expressions of legislative intent could hardly be imagined. Reading these statements either alone or in light of the extensive legislative and judicial history of the term "navigable waters," the following can be stated unequivocally: First, the term "navigable waters" was to include all water bodies under the expanded *judicial* interpretation of that term – not administrative determinations that had been or may be made for ease or efficiency; and Second, once such water bodies were defined in spatial terms, the federal interest in protecting these "navigable waters" from pollution would apply. To view these statements in any other light as reflecting something more would be inconsistent not only with the words used but also with the language and history of the Act when read as a whole, particularly the legislative history of section 402(a)(4), 33 U.S.C. §1342(a)(4) (1982).

Section 402(a)(4) "deems" all permits issued under the Refuse Act to be permits issued under the FWPCA. Had Congress believed that the geographic scope of the Refuse Act was deficient

in any respect, it could have simply grandfathered Refuse Act permits and then repealed that Act. Instead, Congress not only retained the Refuse Act but also "deemed" all permits issued under the new law to be Refuse Act permits, thereby indicating its intent that the geographic scope of the new program would be the same as that of the Refuse Act. Although criticisms of earlier, crabbed *administrative* determinations under that Act had been raised, the relevant legislative history of the 1972 Amendments is totally devoid of any comment indicating that the geographic scope of "navigable waters" under the Refuse Act, as determined by the case law, was in any respect deficient.

Nowhere in the discussion, debate or reports that accompanied this legislation is there any mention made that the Commerce Clause power being exercised was to be interpreted as anything other than the exercise of that power as it had been applied to waterborne commerce. Each and every one of the numerous court decisions cited in that history dealt with Commerce Clause power as that power is defined by reference to waterborne commerce.[40] Had Congress believed that the constitutional power then being exercised was something more, surely at least one such citation would have been given.[41] This glaring absence is, of course, unexplained by the government because it ascribes an intent to the 92nd Congress that simply did not exist.[42]

With full knowledge of what the term "navigable waters" meant and how it had been interpreted by the courts, Congress passed the Federal Water Pollution Control Act Amendments of 1972 on October 18, 1972.

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[40] *See* references cited and quoted *supra* note 39.

[41] *See, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 100 (1941).

[42] Brief for the United States at pp. 19-21.

III. Subsequent Regulatory Developments, In Response To Litigation, Ignored The Totality Of The Act's Legislative History And Expanded Federal Control To Include Wet Lands Periodically Inundated By "Navigable Waters."

Following enactment of the 1972 Amendments, the Corps embarked upon rulemaking to develop regulations implementing section 404 of the Act, 33 U.S.C. §1344 (1982). By the time it published final regulations,[43] jurisdiction under the Refuse Act over navigable waters and tributaries thereof had been firmly established.[44] Despite clear legislative intent to cover tributaries under the Act's definition of "navigable waters," the Corps elected to exclude tributaries from its regulatory control.[45]

Not surprisingly, the Corps' limited assertion of jurisdiction[46] resulted in litigation. On cross motions for summary judgment, the district court quite correctly declared that the defendants

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[43] 39 Fed. Reg. 12115 (1974).

[44] *See United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655 (1973).

[45] In EPA's definition of this same statutory term, the tributaries of navigable waters properly fell within the reach of its permitting authority. 40 C.F.R. §125.1(p) (1975). EPA's definition went considerably further, however, and included all waters utilized by interstate travelers or by industrial facilities engaged in interstate commerce and all waters from which fish or shellfish are taken and sold in interstate commerce. Although inclusion of these other "waters" may well have been beyond congressional intent, at least this expansion was limited to existing, indentifiable water bodies (i.e., "intrastate lakes, rivers and streams"). More significantly, EPA's definition of "navigable waters" did not then include wetlands.

[46] It may well be that the Corps then considered section 404 as being no more than a continuation of its power under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403 (1982), to authorize the excavation or filling of any navigable water of the United States. Indeed, such a view at least finds some support in the legislative history:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and

had "acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act." *Natural Resources Defense Council, Inc. v. Callaway,* 329 F. Supp. 685, 686 (D.D.C. 1975). In a cryptic opinion, most notable for its excessive brevity, the district judge opined that the statutory definition served to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause" and that "the term ['navigable waters'] is not limited to the traditional tests of navigability." *Id.*

The court's holding was clearly correct. The language used to justify that holding was also correct, if somewhat misleading because of its brevity. As discussed previously, the Commerce Clause power referred to in the 1972 legislative history was *not* to the full panoply of that power as is sometimes seen in the decisions of this Court, but to the maximum extent of that power as it had been applied to waterborne commerce. Further, because of the Corps' obvious error in refusing to exercise jurisdiction over tributaries, there can be no question but that its jurisdictional definition of "navigable waters" could not be limited to the traditional tests of "navigability." So considered, both cited rationales were correct. The government did not appeal, electing instead to proceed with rulemaking pursuant to the court's order.[47]

The Corps proposed new regulations on May 6, 1975 and promulgated interim final rules on July 25, 1975.[48] The original

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did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie). *See also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 130 (1972). Unlike the Refuse Act, 33 U.S.C. §407 (1982), section 10 makes no reference to excavating or filling the tributaries of navigable waters.

[47]As subsequent regulatory developments and this litigation suggest, it may have been that the government was not opposed to asserting broad federal jurisdiction over all waters and all wet land, unencumbered by the constitutional constraints concerning waterborne commerce recognized in the Act's legislative history.

[48]*See* 40 Fed. Reg. 19766 (1975) and 40 Fed. Reg. 31320 (1975). The development and promulgation of these regulations are unusual in

proposal presented four alternatives, the first of which included a broad assertion of federal regulatory jurisdiction under essentially federal control. It was this approach that was later adopted in the interim final rules.

As proposed, Alternative I would have defined "navigable waters" as including seven discrete types of water bodies, the extent of each being up to the headwaters and shoreward to the ordinary high water mark[49] or to the aquatic vegetation line, whichever extended further.[50] The "aquatic vegetation line" was then defined as "the line beyond which aquatic plants, dependent on periodic inundation for growth, do not thrive."[51] Although wetlands were not separately defined, adoption of the "aquatic vegetation line" clearly would have resulted in many contiguous wetland areas being covered under this approach.[52]

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that the controversy spawned by Judge Robinson's decision and the Corps' regulatory response resulted in extensive hearings in the House of Representatives (*Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation,* 94th Cong., 1st Sess. (1975) (hereinafter cited as House 404 Regulatory Hearings)) and the Senate (*Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works,* 94th Cong., 2d Sess. (1976) (hereinafter cited as Senate 404 Regulatory Hearings)).

[49]For tidally influenced waters, the proposed limit was to the monthly high tide line. 40 Fed. Reg. 19766 (1975).

[50]40 Fed. Reg. 19770 (1975). The seven designated water bodies were: inland navigable waters and tributaries thereof; tidally influenced water bodies; inland interstate waters; and inland intrastate lakes, rivers and streams which are used by interstate travellers, from which fish are taken and sold in interstate commerce or which are utilized for industrial or agricultural purposes by those engaged in interstate commerce. *Cf.* 40 C.F.R. §125.1(p) (1975) (EPA's definition of "navigable waters").

[51]40 Fed. Reg. 19770 (1975).

[52]In its earlier regulations, the Corps had defined wetlands, for non-jurisdictional purposes, as "those land and water areas subject to regular *inundation by tidal, riverine, or lacustrine flowage.* Generally in-

The interim final regulations simply reorganized the proposed definition described above.[53] Instead of repeating the phrase "or to the aquatic vegetation line, whichever extends further" to describe each of the designated water bodies and then separately defining the aquatic vegetation line, the interim final regulations established separate definitions for "coastal wetlands" and "freshwater wetlands."[54] A comparison of these "wetland" definitions with the earlier "aquatic vegetation line" definition shows that exactly the same areas would be covered under each formulation.

Under the aquatic vegetation approach, the areas to be covered could go no further than the limits of periodic inundation because the required vegetation must be "dependent on periodic inundation."[55] The areas to be covered under the coastal/freshwater wetlands approach were limited to those areas that are periodically inundated by salt, brackish or fresh water *and* that are normally characterized by the prevalence of

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cluded were inland and coastal shallows, marshes, mudflats, estuaries, swamps and similar areas *in coastal and inland navigable waters*. 39 Fed. Reg. 12115, 12121 (1974) (emphasis added). Clearly, the definitions proposed in 1975 were largely a reiteration of this earlier definition, but now in a jurisdictional context. *Cf.* Preamble, 40 Fed. Reg. 19767 (1975).

[53]*Compare* 33 C.F.R. §209.120(d)(2) (1977) *with* Proposed 33 C.F.R. §209.120(d)(2) (Alternative I), 40 Fed. Reg. 19770 (1975). To make its expanded permitting authority more manageable, the Corps exempted a wide variety of activities from its regulatory control, 33 C.F.R. §209.120(d)(4), (5) and (6) (1977), and instituted a mechanism for the issuance of general permits for certain non-exempt activities, 33 C.F.R. §209.120(i)(2)(ix) (1977).

[54]Coastal wetlands were defined as "those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction." Freshwater wetlands were defined as "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. § 209.120(d)(2)(i)(*b*), (*h*) (1977).

[55]40 Fed. Reg. 19767 (1975).

vegetation that requires saturated soil conditions. Thus, both approaches required that the area be periodically inundated by navigable waters[56] in order to be included within the general scheme of regulatory controls.[57]

IV. Because The 1977 Amendments Did Not Alter The Definition Of "Navigable Waters," Its History Cannot Be Used To Discern The Intent Of Congress When It Defined That Term In 1972 (This History May, However, Evidence A Legislative Ratification Of The Corps' 1975 Rules).

In support of its asserted jurisdiction over certain land areas that are periodically wet, the government places heavy reliance upon the 1977 Amendments to the FWPCA.[58] Although the section 404 permit program was substantially revised in 1977 and although revised definitions were proposed and defeated,[59]

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[56]The unique legislative history of these regulations makes clear that the intent of the drafters was that periodic inundation be by way of flooding from adjacent, navigable waters and not by rainfall collecting at the site or by inundation from ground water sources. *See* House 404 Regulatory Hearings at 4, 6-7, 10-11, 31, 74. It is also noteworthy that numerous environmental groups supported the definitions contained in these interim final regulations. *See* Senate 404 Regulatory Hearings 213 (National Audubon Society), 327 (Natural Resources Defense Council), 391 (National Wildlife Federation), 450 (The Sport Fishing Institute), and 454 (Conservation Foundation). Indeed, as conceded by Mr. Speth (NRDC): "It may well be that the implications of Section 404 are larger than Congress originally envisioned." Senate 404 Regulatory Hearings 327.

[57]Although vague, open-ended authority to include other areas (e.g., intermittent streams and isolated wetlands) within regulatory coverage appears, this was a discretionary authority, to be exercised by the District Engineer on a case-by-case basis where necessary to protect water quality. 33 C.F.R. §209.120(d)(2)(i)(*i*) (1977). A careful review of the legislative history of these regulations shows that little, if any, attention or consideration was given to this new provision. In any event, we are unaware of any circumstances in which this discretionary, site-specific authority was ever exercised by a District Engineer.

[58]Brief for the United States at pp. 22-27.

[59]It is hornbook law that the failure of Congress to act is an exceedingly slender reed upon which to base an implied expression of

Congress did not alter the definition of "navigable waters." Thus, the history which preceded and culminated in the adoption of the 1972 Amendments should be controlling on the issue of legislative intent.[60] At most, the 1976-1977 legislative history can be read as tacit ratification by Congress of the Corps' 1975 interim final regulations. To read one whit more into that history or to suggest that Congress intended federal jurisdiction to extend one inch further would constitute a gross perversion of statutory construction and legislative intent and would serve to allow individual legislators and well-intentioned federal officials to dictate the intent of Congress.

In the 1976 legislative session the House Committee on Public Works reported out a bill[61] which, if passed, would have clarified federal jurisdiction over "navigable waters" by rendering inapplicable those judicial precedents which had recognized that "navigable waters" include historically navigable waters and that "navigable waters," once defined in fact, were forever to be considered navigable in law. By a vote of 234 to 121, the Committee approach was amended on the floor to add a reference to "adjacent wetlands."[62] Significantly, the term "adjacent wetlands" was there defined in precisely the same manner as the Corps' 1975 definition of coastal and freshwater wetlands.[63]

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legislative intent. *See, e.g., Federal Trade Commission v. Dean Foods Company,* 384 U.S. 597, 608 (1966); *United States v. Wise,* 370 U.S. 405, 414 (1962); *Helvering v. Hallock,* 309 U.S. 106, 120 (1940).

[60]*See Regional Rail Reorganization Cases,* 419 U.S. 102, 132 (1974); *United States v. Mine Workers of America,* 330 U.S. 258, 282 (1974); *National Woodwork Manufacturers Ass'n v. N.L.R.B.,* 386 U.S. 612, 639 n.34 (1967).

[61]H.R. 9650, §17, Federal Water Pollution Control Act Amendment of 1976, *reprinted in* H.R. Rep. No. 1107, 94th Cong., 2d Sess. (1976).

[62]123 Cong. Rec. 16564-65 (1973). This amendment, proposed by Representative Wright and commonly referred to as the Wright Amendment, *Id.* at 16552, was fully discussed on the floor of the House before passage. *Id.* at 16552-59.

[63]*Compare* 122 Cong. Rec. 16572 (1976) *with* 33 C.F.R. §209.120(d)(2)(i)(*b*), (*h*) (1977).

The Senate Committee on Public Works then sent a bill to the floor which took a slightly different approach.[64] On the floor, Senator Tower proposed the Wright Amendment, which initially passed by a vote of 39 to 38.[65] Senator Baker then arrived and after winning two procedural votes achieved passage of the Baker-Randolph Amendment.[66] The Senate and House proposals were sent to conference, but a compromise could not be reached and both bills died.

House action again preceded Senate consideration of FWPCA amendments in 1977. The Committee on Public Works reported out a bill (H.R. 3199) which reflected the Wright Amendment approach to geographic scope.[67] Efforts to amend this approach on the floor failed,[68] and the bill passed the House by a vote of 361 to 43 on April 5, 1977.[69]

Senate consideration was equally swift. The Committee on Environment and Public Works reported out a bill (S. 1952) on July 28, 1977, which again reflected the Baker-Randolph approach.[70] Senate Bentson proposed the Wright Amendment on the floor, but it failed by a vote of 45 to 51.[71] After passage of the bill on August 4, 1977, it and H.R. 3199 were sent to conference.

The conferees agreed not to alter the definition of "navigable waters," electing instead to exempt a host of activities from federal controls and to authorize expressly the continued issuance by the Corps of nationwide and regional general permits.

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[64]By a vote of 7 to 6, the Committee approved an amendment proposed by Senators Baker and Randolph. The text of the Baker-Randolph Amendment is found at 122 Cong. Rec. 28776-78 (1976).

[65]122 Cong. Rec. 28793 (1976).

[66]122 Cong. Rec. 28794-95 (1976).

[67]H.R. Rep. No. 139, 95th Cong., 1st Sess. 44-46 (1977). *See also Id.* at 20-25.

[68]123 Cong. Rec. 10426-32 (1977).

[69]123 Cong. Rec. 10434 (1977).

[70]S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977).

[71]123 Cong. Rec. 26710-29 (1977). It is interesting to note that as of that date no less than 406 members of the 95th Congress had voted to approve the Wright approach while only 94 were opposed.

Both these approaches, reflected in the Corps' 1975 regulations and extensively discussed during the 1975-1976 regulatory hearings,[72] confirmed in law what the Corps had been doing administratively. Moreover, numerous statements in the reports and debates throughout the 1977 legislative session show a remarkable awareness of and familiarity with the Corps' 1975 regulations.[73] Thus, the 1977 Amendments and their legislative history [74] may constitute an effective legislative ratification of the Corps' interim final rules.[75]

The only report language cited by the government from this history is referred to as being "particularly significant because it demonstrates beyond peradventure Congress' understanding of the Corps' [phased implementation under its interim final regulations]."[76] To the extent this report language indicates

[72]House 404 Regulatory Hearings, *supra*, and Senate 404 Regulatory Hearings, *supra*.

[73]As to phased implementation, a concept only applicable under the Corps' interim final regulations, see S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977); 123 Cong. Rec. 26720 (1977) (statement of Sen. Hart); *Id.* at 26714-16 (statement of Sen. Stafford); H.R. Rep. No. 139, 95th Cong., 1st Sess. 22 (1977); 123 Cong. Rec. 38969 (1977) (statement of Rep. Roberts); 123 Cong. Rec. 39208-09 (1977) (statement of Sen. Baker). As to general permits, see 123 Cong. Rec. 26714-15 (1977) (statement of Sen. Stafford); *Id.* at 26770-71 (statement of Sen. Nunn); S. Rep. No. 370, 95th Cong., 1st Sess. 80 (1977); H.R. Rep. No. 830, 95th Cong., 1st Sess. 100 (1977); 123 Cong. Rec. 39209 (1977) (statement of Sen. Baker). As to the enumerated exemptions from permitting requirements, see S. Rep. No. 370, 95th Cong., 1st Sess. 75-77 (1977); 123 Cong. Rec. 26766-67, 26772-73 (1977) (statements of Senators Dole, Muskie, Allen, Church and Randolph); H.R. Rep. No. 830, 95th Cong., 1st Sess. 105 (1977); 123 Cong. Rec. 39209-11, 39216-17 (1977) (statements of Senators Baker, Wallop and Heinz).

[74]P.L. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§1251-1376 (1982)).

[75]*See Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983) and cases cited therein.

[76]S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977), referred to in the Brief of the United States at pp. 23-24 n.16.

legislative ratification of 1975 regulations, it may be relevant here, but it does not and cannot be used to support a broader assertion of federal jurisdiction beyond the contours of the 1975 regulations.

Had Congress then affirmatively redefined the term "navigable waters," the 1977 legislative history, including the statements of individual members, could be useful in discerning congressional intent, but such did not occur. Since no change to the statutory definition was made, the controlling history on the proper interpretation of "navigable waters" must be the 1972 history and its antecedents – not the post-hoc views of individual Congressmen and Senators.[77] Although a limited exception may apply where clear legislative ratification of administrative action occurs, such cannot serve to alter the fundamental premise of and asserted constitutional basis for enacting amendments to the FWPCA in 1972.[78]

V. The Corps' Unprecedented Administrative Expansion Of Federal Jurisdiction In 1977 To Include Certain Lands Within Its Definition Of "Navigable Waters" Was Contrary To Congressional Intent Expressed In 1972 And Well Beyond Any Limits Considered By Congress In 1977.

The Corps greatly expanded the apparent scope of its regulatory jurisdiction when it redefined the term "navigable waters" in 1977 to include "wetlands," which it then defined as

> those areas that are *inundated or saturated by surface or groundwater* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of *vegetation typically adapted for life in saturated soil conditions.*

(emphasis added).[79] Whereas the 1975 definition required periodic *inundation by navigable waters* and the presence of

[77]As cited by the government, Brief of the United States at 24-27.

[78]*See* discussion *supra* 15-17 & note 39.

[79]42 Fed. Reg. 37122, 37144 (1977). Whereas the 1975 regulations were thoroughly reviewed and considered by Congress, only a handful

vegetation that *requires* saturated soil conditions, the 1977 revisions retained neither requirement. By administrative edict, lands merely saturated by rainwater or groundwater were then deemed to be "navigable waters" if certain types of vegetation are also present.[80]

The fear of the court below is well founded:[81] low-lying backyards may now be subject to the full panoply of federal

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of isolated references to the 1977 regulations appear anywhere in the legislative history, and each of these is wholly devoid of anything more than a simple reference to their existence. *See* 123 Cong. Rec. 26718-19 (1977) (statement of Sen. Baker); *Id.* at 26721-22 (statement of Sen. Tower); 123 Cong. Rec. 10427-28 (1977) (statement of Rep. Smith). *Compare with* references cited, *supra* note 73. Thus, it cannot be contended seriously that Congress also legislatively ratified the 1977 regulations.

[80]The types of vegetation used to identify wetlands under this regulation include trees and other species that merely tolerate moist soil conditions to grow and reproduce. *See* U.S. Department of Interior, Fish and Wildlife Service, *Classification of Wetlands and Deep Water Habitats of the United States* (1979); U.S. Army Engineer Waterways Experiment Station, Dept. of Army, *Wetlands Delineation Manual,* Rpt. No. Y-84 (1985 Draft).

[81]As observed by the court in its order denying the government's petition for rehearing:

> The government and organizations filing as amicus curiae would apparently have the Court by injunction prevent the owner from using low lying areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into "navigable waters" by the Court without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable waters. Under such a construction, low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is overbroad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction.

United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 401 (6th Cir. 1984).

power under the Corps' 1977 regulatory definition. If one levels his low-lying backyard without first applying for and receiving a Corps permit, he risks civil penalties of up to $10,000 per day plus criminal fines of up to $25,000 per day plus imprisonment for up to a year.[82] Surely, this could not have been intended by Congress, yet this logically follows from the government's position defending the full sweep of its regulations as written.[83] Accordingly, to the extent the 1977 regulations extended the term "navigable waters" beyond the reach of the 1975 regulations, such action was unlawful and well beyond any conceivable intent of Congress expressed in the Act's relevant legislative history.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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[82]FWPCA §309, 33 U.S.C. §1319 (1982).

[83]Since the definition of "navigable waters" applies to permits under section 402, as well as to permits under section 404, and since a sprinkler is unquestionably a point source, it is at least possible that a section 402 permit must also be applied for before that individual waters his backyard. If he does not, he may face the same potential civil and criminal sanctions. Of course, one would expect that EPA and the Corps would exercise their enforcement discretion and not prosecute such offenders (if the government were to prevail here).